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91-1227

Supreme Court, U.S.
FILED
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MIRIAM DONNER,

Petitioner,

vs.

APPALACHIAN INSURANCE COMPANY, a Rhode Island corporation, CITY OF MIAMI, VERNON HETHERINGTON, FOWLER, WHITE, BURNETT, HURLEY, BANICK & KNIGHT, P.A. a/k/a FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P. A., a Florida professional association, PHILLIP W. KNIGHT, and MICHAEL J. MURPHY,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITION FOR WRIT OF CERTIORARI

Miriam Donner,
in proper person
P. O. Box 1232
Hallandale, Fla. 33008

QUESTIONS PRESENTED FOR REVIEW

1. May a state court dismiss with prejudice federal [42 U.S.C. §1983 and 18 U.S.C. §1964(c)] claims solely in reliance upon its own state-law-based rule of immunity for litigation-related misconduct?

2. Are a municipality, its officer, insurer, and counsel "absolutely immunity" under 42 U.S.C. § 1983 for conspiring under color of state law to conceal, and withhold production of, information and public records, requested in state-court-litigation pretrial discovery, by fraudulently responding that the information and records do not exist and in furtherance of that conspiracy also denying the right of access to those public records in defiance of an extrajudicial demand (under a state "public records" law) for access thereto?

3. Does any such immunity exist under 18 U.S.C. § 1964(c) (RICO)?

4. Did the complaint state § 1983 and RICO claims by alleging that the said conspiracy was under color of state law, that the false discovery responses were served by mail over a period of several years in a state-court damage suit for false arrest, federal civil rights violations, etc., that the fraud was concealed for over ten years, and that the conspiracy prejudicially interfered in that suit with plaintiffs' (First and Fourteenth Amendment) right of access to the court, delayed for ten years the progress of that suit, caused loss of relevant evidence, faded memories of witnesses, added expense and mental anguish and also prejudiced her claims against other defendants?

5. Did the lower court err in dismissing the complaint with prejudice without even one opportunity to amend?

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OPINION BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported as Donner v. Appalachian Insurance Co., 580 So.2d 797 (1990) and is reprinted at pages 1-4 of the appendix, post. That is the only reported opinion in this case. Various other, unreported orders of the trial court, the Third District, and the Florida Supreme Court are reprinted at pages 5-11 of the appendix.[1]

CONCISE JURISDICTIONAL STATEMENT

The District Court of Appeal of Florida entered judgment May 7, 1991. Rehearing was denied July 3, 1991. That judgment includes legal reasoning with citation of authorities "which [The Florida Star v. B.

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[1] The names of all parties appear in the caption of the case. There are no parent or subsidiary companies.

J.F., 530 So. 2d 286 (Fla. 1988) has held] is subject to discretionary review by the [Florida] state court of last resort" as contemplated by Sup. Ct. R. 13.1. The "state court of last resort," the Florida Supreme Court, denied a petition for discretionary review of that judgment on October 29, 1991. This petition was timely filed "within 90 days after the order denying discretionary review." Jurisdiction of this Court to review that judgment is invoked under 28 U.S.C. Sec. 1257 (a).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const., amend. I, U.S. Const., amend XIV, sec. 1, 42 U.S.C. sec. 1983, 18 U.S.C. sec. 1961 (1970) (amended 1984, 1986, 1988, and 1989), 18 U.S.C. sec. 1962 (1970) (amended 1988), 18 U.S.C. sec. 1964(c), and 18 U.S.C. sec. 1341 (1970) (amended 1988), involved in this case, are

quoted, in pertinent part, at pages 12-17 of the appendix.

STATEMENT OF THE CASE

Petitioner Donner seeks review of a Florida state appellate court affirmance of a judgment of dismissal with prejudice, granting defendants' motions to dismiss the complaint in Case No. 89-37625. Donner, as plaintiff, instituted that case in 1989 in the Eleventh Judicial Circuit of Florida. Donner's complaint named as defendants Appalachian Insurance Company ("Appalachian"), City of Miami, Florida ("the City"), City of Miami Police Officer Vernon Hetherington ("Hetherington"), Fowler, White, Burnett, Hurley, Banick & Knight, P. A. ("Fowler"), and attorneys Phillip W. Knight ("Knight") and Michael J. Murphy ("Murphy").

A. SUMMARY OF COMPLAINT

The allegations of Donner's complaint may be summarized as follows.

In previously-filed Circuit Case No. 76-8301, Donner had sued Hetherington, the City, and their insurer, Appalachian. In that earlier 1976 suit, Metropolitan Dade County, Florida ("Dade County") and certain county correctional officers (not parties to the case at bar) were also joined as defendants. In that earlier suit for damages, Donner claimed that, while exercising her "First Amendment" right to picket and gather signatures on a petition, she was falsely arrested on a charge of breach of peace by Hetherington, acting within the course and scope of his employment as a City of Miami Police Officer "under color of state law," and was thereby deprived of her "civil rights"; as a

result of that arrest, she was imprisoned in the Dade County Women's Annex as a pretrial detainee for five days; the personnel of that Annex, acting within the course and scope of their employment as employees of Dade County and "under color of state law," assaulted her, stripped her naked, and left her in a cold solitary cell (all in full view of male prison personnel) without clothing, blankets, towels, linen, medical attention, exercise facilities, running water, operable toilet, or elements of personal hygiene for four days; the breach of peace charge was ultimately dismissed.

Insurer Appalachian retained the Fowler law firm to represent defendants in Case No. 76-8301 and supervised their rendition of legal services. Attorneys Knight and Murphy, in the employ of that firm,

appeared in that case as defense counsel.

The City and Hetherington denied that the arrest was without "probable cause."

In Case No. 76-8301, "under color of state law," the City, Hetherington, Appalachian, the Fowler law firm, and Knight, in conspiracy with one another, engaged in the following pattern of fraudulent misrepresentation and concealment.

The City's April 12, 1976 answers to interrogatories, served by mail upon Donner by defense counsel Knight, falsely represented that witnesses to the arrest were "unknown."[2] In truth, names and ad-

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[2] Those same answers to interrogatories falsely stated that the City's insurer is "unknown" -- even though it was Appalachian that had retained the Fowler law firm. That same firm served Hetherington's answer to an insurance interrogatory, disclosing only Appalachian's policy. Then, in response to Donner's request for production of all policies, the City misrepresented the insurance coverage as limited just to the Appalachian policy, produc-

dresses of witnesses to the arrest incident were known to defendants since 1975 but those witnesses were no longer available to testify when finally years later Donner learned of them.

Hetherington's answers to interrogatories, served in 1977 by mail upon Donner by defense counsel Knight, falsely represented that the only statement given by Hetherington concerning the incident was a July 1, 1975 statement. Knight wrote a letter to the trial judge, falsely representing that the City had only that July 1, 1975 statement and a June 23, 1975 statement of Officer Parker. In 1978, Knight mailed Donner the City's responses to her requests for production, falsely representing that all records requested

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ed just the Appalachian policy, and concealed three other policies.

therein and ordered to be produced had been produced, and he mailed her a like false response to her motion for discovery sanctions. He even served upon her by mail Hetherington's false disclaimer of the authenticity of the two statements that the City had produced.

In addition to the officers' aforementioned statements that were produced, other requested-to-be-produced statements were known to, and in the custody of, the City, its counsel, and Appalachian but were not produced and in fact were concealed. Donner's complaint describes those concealed statements and explains their evidentiary significance favorable to her case and their relevance to the issues of both liability and damages.

At the 1980 trial in that case, the court directed a verdict in favor of the

City, Hetherington and Appalachian and entered judgment on that directed verdict. One year later, that verdict and judgment were reversed on appeal. Donner v. Hetherington, 399 So.2d 1011 (Fla. Dist. Ct. App. 1981). That action remains (now sixteen years later) still pending in the trial court. If not for that misrepresentation and concealment, Donner would have had access to those withheld records and could have presented additional evidence at the 1980 trial that would have contradicted and impeached Hetherington's testimony and would have avoided entry of that directed verdict and the expense and mental anguish attendant upon the aforementioned appeal. At that 1980 trial, after that verdict was directed, the jury returned a $15,000 verdict on Donner's claims against Dade County and its correc-

tional officers. The amount of that verdict was impaired as a result of the unavailability to Donner of those concealed records.

All those representations were known by defendants to be false when made or were made without knowledge of whether they were true, were made with the intention that Donner rely upon their truth, and were material to the preparation and presentation of her case for trial, not only against Hetherington, the City, and Appalachian, but also against Dade County and its correctional officers, and Donner did so rely to her detriment.

On October 28, 1981, Donner made a "public records demand" upon the City Attorney, upon the Fowler law firm, and upon Murphy to produce their respective case files relating to the claims asserted

in Case No. 76-8301. Included in those files were the concealed statements, records referring thereto, and records confirming defendants' knowledge of the concealed items of information.

In response to that request, in order to conceal that scheme, and in order to deprive Donner of her claims asserted in Case No. 76-8301, the City, Fowler and Murphy, in conspiracy with one another and with the other defendants and "under color of state law," responded that the demanded public records would be produced only "when donkeys fly." Donner was forced to initiate Case No. 81-369 EX, a mandamus proceeding against Murphy, Fowler, and the City, to gain access to those records. That proceeding resulted in the issuance of a writ of mandamus requiring those records custodians to produce the demanded

public records and on August 19, 1985 public records were for the first time produced to Donner for inspection.

During the four-year duration of that mandamus proceeding, Case No. 76-8301 was stayed and further delayed. Also as a result of that conspiracy, Donner suffered mental anguish, evidence useful in prosecuting her claims (including claims for violation of her "civil rights") has been lost, and memories of witnesses useful in prosecuting her claims (including claims for violations of her "civil rights") prejudicially faded.

B. DISMISSAL OF THE COMPLAINT WITH PREJUDICE

In Case No. 89-37625, two motions to dismiss the complaint were filed, one in behalf of Hetherington and the City and the other in behalf of Appalachian, Fowler, Knight and Murphy. Appalachian's

motion asserted as a ground "absolute privilege" for "statements or pleadings made in the course of judicial proceedings" but cited no supporting authority. The motion filed in behalf of the City and Hetherington asserted no such "privilege." The trial court granted both motions to dismiss and dismissed the complaint with prejudice, but without specifying the ground for dismissal. (appendix 5-7) Donner's timely-filed motion for rehearing and timely addendum thereto pointed out that the complaint sets out causes of action under Florida state law, under "18 U.S.C. Sec. 1964(c)," and under "42 U.S.C. Sec. 1983." Her motion alternatively requested at least one opportunity to amend the complaint. That motion for rehearing and addendum thereto were denied.(appendix 8-9)

C. APPEAL AND AFFIRMANCE

Donner appealed that dismissal to the District Court of Appeal of Florida, Third District. Donner briefed as issues presented for review her contentions that "all elements of a federal civil rights action are alleged" (Donner's Initial and Reply Briefs), that "all elements of a federal civil RICO action are alleged" (Donner's Initial and Reply Briefs), and that no privilege for statements made in the course of judicial proceedings applies under Sec. 1983 or RICO to defendants' alleged misconduct (Donner's Initial and Reply Briefs).[3] In regard to the above-quoted issues, Donner argued that privilege under Sec. 1983 "is an issue of fed-

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[3] Donner also presented as an issue on appeal, and briefed argument in regard to, the trial court's erroneous denial of her request for leave to amend the complaint.

eral, not Florida, law," and that, under federal law, neither defendants' concealment of witnesses' names (requested in interrogatories) and of records (requested to be produced in pretrial discovery and in public records demands) nor their fraudulent misrepresentations in furtherance thereof, nor their conspiracy in that regard were immunized from Sec. 1983 or RICO liability by any "litigation" or judicial-proceeding "privilege." (Donner's Initial and Reply Briefs) Those appellate arguments were supported by citations to federal precedent. Additionally, Donner's Initial and Reply Briefs argued, and cited, in the context of federal RICO, federal cases affirming mail fraud convictions for false statements and false answers to interrogatories in judicial proceedings.

The Third District affirmed with an opinion. (appendix 1-4) In regard to Case No. 76-8301, the Third District stated:

> "Following a series of false starts, frustrated discovery forays, and appeals, the 1976 action languishes below awaiting retrial."

(appendix 1-2) The opinion next adverts to Donner's public records mandamus proceeding, "seeking access to the litigation files from" Case No. 76-8301, to her successful prosecution of that proceeding, and to her allegation that only when those files were produced under the writ of mandamus did she uncover defendants' "alleged fraudulent misrepresentations made during discovery" in Case No. 76-8301. According to that opinion, Donner then filed Case No. 89-37625 and

> "... [pled] multiple causes of action arising from alleged fraudulent misrepresentations ... The trial court dismissed that complaint with prejudice for failure to state a claim."

(appendix 2-3) No reference is made in that opinion to the federal nature of claims pled in Donner's complaint. Nor are any federal cases cited. The Third District merely states:

> We agree with the trial court that the complaint Ms. Donner filed in this action failed to state a cognizable claim. *See Ponzoli & Wassenberg, P. A. v. Zuckerman*, 545 So.2d 309 (Fla. 3d DCA 1989), *rev. denied*, 554 So. 2d 1170 (Fla. 1989) (statements made in the course of judicial proceedings enjoy absolute privilege); *Wright v. Yurko*, 446 So. 2d 1162 (Fla. 5th DCA 1984); *Perl v. Omni Int'l of Miami, Ltd.*, 439 So. 2d 316 (Fla. 3d DCA 1983) (same).

(appendix 3) Footnote 3 to the opinion below relegates Donner rather to the trial court to apply in the pending 1976 action for "sanctions" in regard to the alleged discovery violations.[4]

Donner timely moved for rehearing,

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[4] Footnote 3 also notes that the opinion should not be read as barring amendment of the complaint in Case No. 76-8301.

pointing out that the Third District's reliance upon Florida state court case precedents concerning state law on the issue of immunity overlooked the fact that her complaint stated federal Sec. 1983 and RICO causes of action and that, under Howlett by and through Howlett v. Rose, 110 S.Ct. 2430 (1990), Martinez v. State of California, 444 U.S. 277 (1980), Briscoe v. LaHue, 460 U.S. 325 (1983), and other cited federal cases, federal, not state, law is controlling. That motion alternatively requested clarification of the opinion to refer to the federal nature of those causes of action to aid this Court in adjudicating a petition for writ of certiorari. That motion was denied. Donner's petition to the Florida Supreme Court for review of the appellate affirmance was also denied. (appendix 10 and 11)

SUMMARY OF ARGUMENT

The Third District's erroneous reliance upon Florida state law as immunizing defendants against liability under Sec. 1983 and RICO is reviewable by this Court even though the Third District omitted any mention of the federal nature of those causes of action. The test to be applied under Street v. New York, 394 U.S. 576, 581-584 (1969) is whether the federal nature of those causes of action was at the trial level preserved for review and was at the appellate level presented for review. That test is fully satisfied by the record below.

The Third District's reliance upon state law as immunizing defendants from liability in regard to those federal claims directly conflicts with this Court's recent decision in Howlett, 110

S.Ct. 2430, requiring the application of federal law.

In regard to the Sec. 1983 claim, this Court has recognized only limited immunity in the context of "defamation" for "statements made in the course of judicial proceedings." That immunity is here inapplicable for the following reasons: Donner's Sec. 1983 claim is not for "defamation"; defendants' concealment of records and information cannot be characterized as "statements"; neither Donner's extrajudicial demand for access to public records nor defendants' extrajudicial denial thereof was "in a judicial proceeding"; pretrial discovery was not known to the common law when Sec. 1983 was enacted; and the underlying conspiracy was not alleged to have been formulated in a judicial proceeding.

That in-any-event-inapposite immunity is not applicable to Donner's RICO claim for the additional reason that this Court noted in Briscoe v. LaHue, 460 U.S. 325, 339 n.22 (1983) -- that statements made in the course of judicial proceedings are not immune from criminal liability. Under 18 U.S.C. Sec. 1964(c), conduct that gives rise to criminal liability also gives rise to civil liability.

This Court should exercise its discretion by accepting certiorari jurisdiction. The Third District's decision conflicts with decisions of this Court and of the Courts of Appeal and deprives Donner of any federal remedy for the damage caused by defendants' misconduct under color of state law that has so long delayed and frustrated her prosecution of Case No. 76-8301, a sixteen-year-old action.

ARGUMENT

I. THIS COURT IS VESTED WITH CERTIORARI JURISDICTION TO REVIEW THE FLORIDA STATE COURT JUDGMENT

This Court is vested with jurisdiction to review the Florida state court judgment because that judgment disposes of an important issue of immunity, regarding Donner's federally-based causes of action, in a way that conflicts with applicable decisions of this Court and of United States courts of appeal.

That conflict is no less real simply because the Third District's opinion chose not to mention the federal nature of the issues disposed of by its judgment. The Third District grounds its decision, that the complaint "failed to state a cognizable claim," solely upon Ponzoli & Wassenberg, P. A. v. Zuckerman, 545 So. 2d 309, Wright v. Yurko, 446 So.2d 1162, and Perl

v. Omni Int'l of Miami, Ltd., 439 So. 2d 316, all cited as applying a privilege immunizing statements made in the course of judicial proceedings. Those cases concerned only non-federal claims. The Third District omits mention of federal law simply by omitting reference to the federal nature of Donner's pleaded claims.

A. PRESERVATION OF ISSUES FOR REVIEW

That omission does not foreclose this Court's exercise of certiorari jurisdiction. In Street v. New York, 394 U.S. 576, 581-584 (1969), even though no mention of the federal issue appeared in the state court judgment, jurisdiction was held to exist where the record below demonstrated that the federal issue had been preserved at the state court trial level for appellate review and had been raised on appeal to the New York state appellate court. The

record at bar meets those criteria.

1. PRESERVATION OF ISSUES AT TRIAL LEVEL

First of all, at the trial level, the federal nature of Donner's Sec. 1983 and RICO claims, not only was explicitly articulated in her timely motion for rehearing and addendum thereto,[5] but also appeared on the face of the complaint. In pleading a statutory cause of action in a Florida state court, it is not necessary to include any reference to the statute, so long as the complaint's factual allegations plead all the elements of the cause of action. City of Lakeland v. Select Tenures, Inc., 129 Fla. 338, 176 So. 274, 277 (1937); Vance v. Indian Hammock Hunt & Riding Club, 403 So.2d 1367, 1369 (1981).

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[5] Fla. R. Civ. P. 1.530(a) and (b) authorizes service of a motion for rehearing of a judgment within ten days after entry thereof.

City of Lakeland, 176 So. at 277 explained that Florida courts are required to take "public cognizance of all public statutes." That rule has now been codified in Sec. 90.201(1), Fla. Stat., mandating that the trial court judicially notice federal (and state) law. The commentary accompanying that statute further states that Florida law is in accord with the statement in McCormick, Evidence Sec. 335 (2nd ed 1972) that "state courts will notice the federal law that is controlling." Furthermore, in Pizzi v. Central Bank & Trust Co., 250 So.2d 895 (Fla. 1971), the Florida Supreme Court held that the trial court is confined "strictly to the allegations within the four corners of the complaint" in adjudicating a motion to dismiss. Florida additionally subscribes to the familiar rule that "[i]f a complaint states a cause

of action upon any ground, a motion to dismiss the complaint for failure to state a cause of action should be denied." Lytell v. McGahey Chrysler-Plymouth, Inc., 180 So.2d 354, 355 (Fla. Dist. Ct. App. 1965). It will be seen that the factual allegations within the four corners of Donner's complaint do plead elements of federal Sec. 1983 and RICO claims.[6]

(a) 42 U.S.C. SEC. 1983 ACTION

First to be considered is Donner's Sec. 1983 claim. Gomez v. Toledo, 446 U.S. 635, 640 (1980) holds that such a claim is alleged simply by stating that defendant deprived plaintiff of a federal right un-

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[6] It will also be seen (in section C of this Argument, post) that, within the four corners of the complaint, appear allegations of misconduct that do not constitute "statements made in the course of judicial proceedings" immune from Sec. 1983 and RICO liability.

der color of state law. Since the defendant City is a local governmental unit, since its insurer and defense counsel allegedly acted in behalf of, and in "conspiracy" with, the City, and since Hetherington allegedly also "conspired" with them, all were properly alleged to have acted "under color of state law."[7] Adickes v. S.H. Kress & Co., 398 U.S. 144, 150-152 (1970); Ryland v. Shapiro, 708 F.2d 967,

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[7] Cities are included among the "persons" subject to liability under Sec. 1983. Monell v. Department of Social Services of City of New York, 436 U.S. 658, 690 (1978). While Monell limits the City's own liability just to acts of official municipal policy, the alleged misconduct of the City acting through its attorneys in Case No. 76-8301 meets that criterion; Fla. R. Jud. Admin. 2.060(1) provides:

> "In all matters concerning ... defense of any proceeding in the court, the attorney of record shall be the agent of the client and any ... act by the attorney in the proceeding shall be accepted as the act of ... the client."

974 (5th Cir. 1983); Harrison v. Springdale Water & Sewer Commission, 780 F.2d 1422, 1426 n.4, 1430, n.14 (8th Cir. 1986). Donner's complaint also sufficiently alleged that defendants' misconduct deprived her of rights secured by the Constitution and under federal law -- her right of meaningful access to court to prosecute Case No. 76-8301. In Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983), the Fifth Circuit held that Ryland's similar complaint, alleging that defendants' misconduct under color of state law delayed for eleven months Ryland's right of access to state court in regard to Ryland's state court wrongful death action, pled a cognizable Sec. 1983 claim for at least nominal damages for First and Fourteenth Amendment violations. Ryland, 708 F.2d at 971-973 cites California Motor Transport

Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (right of access to courts is aspect of First Amendment right to petition); Wolff v. McDonnell, 418 U.S. 539, 579 (1974) (Due Process Clause protects right of access to courts to present claims concerning violations of fundamental constitutional rights); Logan v. Zimmerman, 455 U.S. 422, 428 (1982) (cause of action is species of property[8] protected by Due Process Clause).

Ryland, 708 F.2d at 975 aptly reasoned:

The defendants' actions could have

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[8] In Ryland, 708 F.2d at 973, it is noted that Ryland's wrongful death action had the "property" attribute of inheritability under Louisiana law. In regard to a Sec. 1983 claim, Smith v. City of Fontana, 818 F.2d 1411, 1416-1417 (9th Cir. 1987), cert. denied, 108 S.Ct. 311 (1987), holds that inheritability is determined by state law and, in that regard, Sec. 46.021, Fla. Stat. treats Donner's claims as inheritable.

> prejudiced the Rylands' chances of recovery in state court because the resulting delay would cause stale evidence and the fading of material facts in the minds of potential witnesses. Moreover, it could well prove more expensive to litigate such action. Finally, any interference with a substantive constitutional right, such as the right of access to the courts, may by itself amount to a constitutional deprivation (unless reasonably justified by countervailing state interest).

The allegations of Donner's complaint in Case No. 89-37625 are even more compelling than were those in Ryland because allegedly defendants' under-color-of-state-law misconduct delayed for many years and damaged Donner's underlying causes of action in Case No. 76-8301 that included, not only state-law based claims for false arrest and false imprisonment, but also federally-based claims for First and Fourteenth Amendment violations under

Sec. 1983.[9]

(b) RICO CAUSE OF ACTION

Donner's complaint also stated elements of a RICO claim. Allegedly defendants[10] conspired to send through the mail

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[9] Compare also Zinermon v. Burch, 110 S.Ct. 975 (1990) (availability of state court remedy to correct Bill of Rights violation does not foreclose Sec. 1983 action); Flores v. Perez, 617 F.2d 1386, 1388, 1392 (9th Cir. 1980), cert. denied, 449 U.S. 875 (1980) (Sec. 1983 damages for mental anguish recoverable for discriminatory state action resulting in delay); Memphis Community School District v. Stachura, 477 U.S. 299, 308 n. 11 (1986) (at least nominal Sec. 1983 damages recoverable for constitutional deprivation); Davis v. Village Park II Realty Co., 578 F.2d 461, 463-464 (2d Cir. 1978) (Sec. 1983 damages recoverable for emotional distress and, absent proof of actual injury, nominal damages recoverable for constitutional deprivation); Dykes v. Hosemann, 743 F.2d 1488, 1500 (11th Cir. 1984) (en banc) (nominal and punitive Sec. 1983 damages recoverable).

[10] It has been held that treble RICO damages constitute a "penalty" for which a City may not be held liable. Gentry v. Township of Gloucester, 736 F.Supp. 1322 (D.N.J. 1990)However, the remaining defendants are not thereby exempted.

an extended series of fraudulent pretrial discovery responses, comprising a "pattern"[11] of mail fraud violative of 18 U.S.C. Sec. 1341[12],[13], extending over a continuum of several years, depriving Donner of her property interest in the claims

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[11] H.J., Inc. v. Northwestern Bell Telephone Co., 109 S.Ct. 2893, 2901 (1989); see also Morley v. Cohen, 888 F.2d 1006 (4th Cir. 1989) (fraudulent 1976 and 1977 misrepresentation concealed until 1981).

[12] U.S. v. Peters, 732 F.2d 1004, 1006-1007 (1st Cir. 1984) (affirming mail-fraud conviction under count charging false answers to pretrial discovery interrogatories); U.S. v. Leyden, 842 F.2d 1026, 1029 (8th Cir. 1988), citing Peters as illustrative of the applicability of "mail fraud" to "legal proceedings"; U.S. v. Vaughan, 797 F.2d 1485, 1492-1493 (9th Cir. 1986) (affirming attorney's mail fraud conviction for petition and follow-up letters he knew to be false in administrative proceeding); Tafflin v. Levitt, 110 S.Ct. 792, 798-799 (1990) (many RICO cases involve state fraud claims).

[13] 18 U.S.C. Sec. 1961(1) defines a violation of sec. 1341 as a "racketeering activity."

she asserted in Case No. 76-8301.[14]

(c) LEAVE TO AMEND

Even if, arguendo, some element of Donner's RICO action were pled imperfectly, that circumstance could not explain either the initial complaint's dismissal with prejudice or the Third District's affirmance of that dismissal with prejudice. Such a dismissal would be precluded, first, by her well-pled Sec. 1983 claim and, second, by Florida cases uniformly holding that a plaintiff is entitled to at least one opportunity to amend unless the allegations of the complaint confirm that amendment would be futile. Posey v. Magill, 530 So.2d 985 (Fla. Dist. Ct. App. 1988); Highlands County School Board v. K.D. Hedin Construction, Inc., 382 So.2d

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[14] Logan v. Zimmerman, 455 U.S. 422, 428 (1982) (cause of action is species of property protected by Due Process Clause).

90 (Fla. Dist. Ct. App. 1980); Tucker v. Bray, 458 So. 2d 841, at 842 (Fla. Dist. Ct. App. 1984). Wells Fargo Armored Services Corp. v. Sunshine Security & Detective Agency, Inc., 575 So. 2d 179 (Fla. 1991) recently held:

> "... Florida recognizes a rule favoring a right of amendment after a party has failed to state a cause of action ... denial of a right to amend simply because prior attempts to state a cause of action have failed may be deemed an abuse of discretion."

Nothing in the complaint at bar suggests that any such amendment would be "futile." Donner's appellate briefs clearly adverted the attention of the Third District to these points of law.

The foregoing analysis of the allegations within the four corners of the complaint demonstrates that, in accordance with Street, 394 U.S. 576, the trial

court's erroneous dismissal with prejudice[15] of Donner's federal causes of action was preserved for the Third District's review.

2. PRESERVATION OF ISSUES ON APPEAL

On appeal to the Third District, those issues were equally well preserved for review in Donner's initial and reply briefs and in her motion for rehearing.

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[15] The affirmance of the dismissal "with prejudice" is not altered by the Third District's footnoted comment that its opinion should not be read as barring a motion for leave to amend in Case No.76-8301. That footnote stops short of allowing an amendment that would add as causes of action those claims dismissed in the case at bar. If the Third District's intent were to allow such an amendment, it would, instead of affirming the dismissal with prejudice, have reversed with directions to enter a dismissal without prejudice to a motion for leave to amend in Case No. 76-8301 to add such causes of action. Such an amendment in Case No. 76-8301, especially one adding as parties the attorneys, would now in any event be confronted by a statute of limitations defense.

Section C of the prefatory Statement of the Case, ante, summarizes those issues and arguments, fully presented in her initial and reply briefs and in her appellate motion for rehearing. In fact, as an alternative to rehearing, Donner requested that the Third District clarify its opinion by making specific reference to the federal nature of the issues; that request was likewise denied. According to the Florida Supreme Court's pronouncements in Pizzi, 250 So.2d at 896-897, the only lower court record that was needed for review of the propriety of the order of dismissal was the complaint itself, included in the record below. Thus, the Third District's omission of any mention of the federal nature of the causes of action and its reliance only upon Florida case law is not an impediment to this

Court's exercise of its certiorari jurisdiction pursuant to Street, 394 U.S. 576 to review that Third District decision.

B. STATE COURTS MUST APPLY FEDERAL LAW TO ISSUES OF IMMUNITY IN REGARD TO FEDERAL ACTIONS

A similar error was committed by the Third District's sister court in Howlett v. Rose, 537 So. 2d 706 (Fla. Dist. Ct. App. 1989), rev. denied, 545 So. 2d 1367 (Fla. 1989), rev'd sub nom. Howlett by and through Howlett v. Rose, 110 S.Ct. 2430 (1990). In that Sec. 1983 case, the Florida court likewise eschewed federal law and instead invoked a Florida doctrine of municipal immunity. In reversing that decision, this Court held in Howlett, 110 S.Ct. at 2443-2444:

> "The elements of, and the defenses to, a federal cause of action are defined by federal law."
>
> "'Congress surely did not intend to assign to state courts and legisla-

> tures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action."'

Howlett, 110 S.Ct. at 2443, cites Martinez v. State of California, 444 U.S. 277, 284 (1980), holding:

> "'Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. Sec. 1983 ... cannot be immunized by state law...'"

C. FEDERAL LAW DOES NOT IMMUNIZE DEFENDANTS' ALLEGED MISCONDUCT

Defendants' alleged misconduct is not accorded any immunity under federal law.

1. NO SUCH IMMUNITY ARISES UNDER 42 U.S.C. SEC. 1983

On the issue of immunity under Sec. 1983, Briscoe v. LaHue, 460 U.S. 325 (1983) held that American common law, as found to exist in 1871, is controlling. That case narrowly limited its holding just to the absolute immunity applicable to a witness' allegedly perjured trial

testimony (not to non-testimonial misconduct such as is at issue in the case at bar). Briscoe, 460 U.S. at 332 n.12, quotes with approval the declaration in Johnson v. Brown, 13 W.Va. 71, 128-129 (1878) that the overwhelming weight of authority precluded "an action of slander or libel ... for libelous matter, spoken or written in the course of regular judicial proceedings."[16] In that regard, Tower v. Glover, 467 U.S. 914, 922 (1984) recognizes that, "at common law, defense counsel would have benefited from immunity for

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[16] The Third District's affirmance of the dismissal with prejudice of Donner's claim, erroneously grounded on immunity, stopped short of otherwise considering the legal sufficiency of her claims. Briscoe, 460 U.S. at 328 n.3, accepted jurisdiction to review a lower appellate court decision, grounded solely on immunity, even though that lower court had not passed upon whether the Sec. 1983 claim was otherwise well pled.

defamatory statements in the course of judicial proceedings," citing Justice White's concurrence in Imbler v. Pachtman, 424 U.S. 409, 439 (1976) (both prosecutors and private attorneys' "false and defamatory statements" "made during and relevant to a judicial proceeding" are immune). In that same regard, Burns v. Reed, 111 S.Ct. 1934, 1941 (1991) recognizes that, at common law, witnesses, prosecutors, and lawyers were immune from liability for "false or defamatory statements in judicial proceedings." Justice Scalia's partial concurrence in Burns, 111 S.Ct. at 1946-1947 lists just three categories of immunity, "Judicial immunity," "Quasi-judicial immunity," and "Defamation immunity." Since defendants in the case at bar exercised no judicial or quasi-judicial functions, that would leave only the third category to be

considered. Consistent with the foregoing precedents is Justice Scalia's additional assertion that the third category of immunity extends "only against suits for defamation." Id.

(a) DONNER'S SEC. 1983 CLAIMS ARE NOT FOR DEFAMATION; NOR DOES CONCEALMENT OF INFORMATION EVEN CONSTITUTE A "STATEMENT"

Donner's suit is not for "defamation" for the following reasons. First of all, the City's failure to produce, and concealment of, records requested in pretrial discovery and in the public records demand did not even constitute "statements," much less defamation. Secondly, defendants' false pretrial discovery responses that witnesses are unknown and that all requested records had been produced were not defamatory; rather they prejudicially deprived plaintiff of access to witnesses and delayed access to records useful to

her prosecution of Case No. 76-8301. Thirdly, neither defendants' response that they would produce the demanded public records "when donkeys fly" nor their years of refusal to comply with Donner's access to those public records could be categorized as "defamation"; rather the complaint alleges that their conspiracy to conceal information was thereby furthered and the prejudicial litigation delay exacerbated.

(b) DEFENDANTS' REFUSAL OF DONNER'S PUBLIC RECORDS DEMAND IN FURTHERANCE OF THEIR CONSPIRACY TO CONCEAL RECORDS WAS NOT "IN A JUDICIAL PROCEEDING"

Absolute immunity for that conspiracy, as it relates to defendants' wrongful refusal of Donner's public records demand, is precluded for yet another reason: neither the demand nor the refusal was "in the course of judicial proceedings." Burns, 111 S.Ct. at 1941; Tower, 467 U.S.

at 922; Briscoe, 460 U.S. at 332 n.12. Imbler, 424 U.S. at 426 n.23, limits "defamation" immunity to relevant "courtroom statements" and to lawyers' "briefs and pleadings." While the demanded public records related to Case No. 76-8301, the complaint alleges that Donner's demand and defendants' refusal took place, not in that case, not in any judicial proceeding, courtroom, pleading or brief, but rather under Sec. 119.01 et seq., Fla. Stat. (1975) (allowing public access to public records upon demand). Only after the City and its records custodians extrajudicially failed to comply with that demand was the mandamus proceeding instituted.[17],[18]

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[17] See also opinion below's discussion of the course of events in the mandamus proceeding and its citation to the appellate decisions in that proceeding: Donner v. Edelstein, 415 So.2d 830 (Fla. Dist. Ct. App. 1982) and Edelstein v. Donner, 450 So.2d 562 (Fla. Dist. Ct. App. 1984),

(c) INTERROGATORIES AND REQUESTS FOR PRODUCTION WERE UNKNOWN TO THE COMMON LAW

Pretrial discovery interrogatories, answers to interrogatories, requests for production, and responses to requests for production were unknown to the common law in 1871; nor did they have any analogous counterpart at common law. Although one might argue that defamatory statements included in any such answers and responses ~~might~~ are "in a judicial proceeding" and therefore immunized, no similar argument may be advanced and no 1871 common-law precedent may be found with regard to statements, included in such answers or responses, that are not defamatory, but are fraudulent (such as are at issue in

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approved, 471 So.2d 26 (Fla. 1985).

[18] Compare Burns, at 1944 ~~451~~ (out-of-court legal advice held not absolutely immune)

the case at bar). Analogously, in Burns, 111 S.Ct. at 1943, this Court rejected the amicus curiae's attempt to alibi the absence of 1871 precedents for immunity; the rejected alibi was that the office sought to be immunized first developed after that date. Quoting Tower, 467 U.S. at 922-923, this Court in Burns at 1943 answered that argument as follows:

> "We do not have a license to establish immunities from Sec. 1983 actions in the interests of what we judge to be sound public policy."

Pretrial discovery sanctions were of course also unknown to the common law. Application of the doctrine of immunity to pretrial discovery cannot be rationalized by pointing to modern pretrial discovery sanctions as an alleged equivalent substitute. Discovery sanctions do not fill that role. For example, in the case at bar, allegedly defendants' discovery misconduct

prejudicially diminished the amount of the verdict that Donner secured against Dade County and its correctional officers. No manner of discovery sanction could be fashioned to recoup those damages. No damages, other than attorneys fees and costs, are awarded as a discovery sanction. Moreover, discovery sanctions are imposed against only the party to whom the discovery is directed; no discovery mechanism exists for sanctions against other persons (such as attorneys and insurer) conspiring with them to make fraudulent discovery responses. Even if those persons were to be held in contempt of court, that would not obviate the damage that Donner suffered. Immunity for fraudulent pretrial discovery responses has been rejected in Beeck v. Kapalis, 302 N.W.2d 90 (Iowa 1981) and Morgan v. Graham, 228 F.2d 625 (10th Cir.

1956) (applying state law). Furthermore, in the light of a Sec. 1983 claimant's entitlement to proceed with his claim without first exhausting state tort remedies or other state postdeprivation remedies, cf. Zinermon v. Burch, 110 S.Ct. 975 (1990), the mere fact that there now exist possible state court discovery sanctions should not foreclose the federal remedy.

(d) COMPLAINT DOES NOT ALLEGED THAT CONSPIRACY WAS ENTERED INTO "IN A JUDICIAL PROCEEDING"

Even without regard to any of the foregoing considerations, the facts remain that the complaint alleges defendants' misconduct was pursuant to a "conspiracy" and that nowhere in the complaint is it alleged that the conspiracy was itself hatched "in a judicial proceeding."

For example, the conspiracy necessarily predated the mailing of the City's

fraudulent interrogatory answers that were the product of the conspiracy. Even if the act of serving those answers by mail were, arguendo, assumed at that time to introduce them into the "judicial proceeding" and to render them "defamatory," nonetheless, the antecedent conspiracy would satisfy neither of those two requirements.

Analogously, in Tower, 467 U.S. at 922, this Court held public defenders not to be immune from Sec. 1983 liability for their alleged conspiracy to cause a criminal defendant's conviction, even though any such alleged conspiracy must have been hatched after those public defenders were appointed (and therefore during the time when that judicial proceeding was pending) and even though that conspiracy was allegedly implemented in the criminal proceeding.

Burns, 111 S.Ct. at 1939, aptly states that the person

> "... seeking absolute immunity bears the burden of showing that such immunity is justified ... We have been 'quite sparing' in our recognition of absolute immunity, Forrester, supra, at 224, and have refused to extend it any 'further than its justification would warrant.' Harlow, supra, at 811."

Applying the above-quoted rule to this case, in the light of the fact that the complaint does not allege that the conspiracy was hatched in a judicial proceeding and in the light of the rule in Pizzi, 250 So.2d 895 that, on a motion to dismiss for failure to state a cause of action, only the allegations within the four corners of the complaint may be considered, defendants could not possibly have satisfied their "burden" to show that their conspiracy was absolutely immune. It is evident that the Third District has ex-

tended the scope of immunity, not "sparingly," but rather with the broadest possible brush, outside the parameters prescribed by this Court's prior decisions.

2. NO SUCH IMMUNITY ARISES UNDER FEDERAL CIVIL RICO

The immunity issue is also readily disposed of in the context of RICO. The RICO claim arises under 18 U.S.C. Sec. 1964(c), providing a civil remedy with regard to conduct subject to criminal penalties under the correlative Sec. 1963. In that sense, it differs from a Sec. 1983 claim, restricted to the civil arena. Briscoe, 460 U.S. at 339 n.22 recognizes that there is no immunity from criminal prosecution for statements made in the course of judicial proceedings. Thus, no such immunity can be invoked on the civil side in regard to the double-edged RICO statute. Since there is no immunity from

the parallel criminal RICO liability for statements made during judicial proceedings,[19] neither is there any such privilege under civil RICO. Hence, even if such a privilege were applicable under Sec. 1983, it would not apply under RICO.

II. DISCRETION SHOULD BE EXERCISED IN FAVOR OF ACCEPTING CERTIORARI JURISDICTION

Certiorari jurisdiction should be accepted not only because of the foregoing analysis demonstrating the conflicts between the Florida state court decision and the decisions of this Court and of the

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[19] U.S. v. Peters, 732 F.2d 1004, 1006-1007 (1st Cir. 1984) (affirming mail-fraud conviction under count charging false answers to pretrial discovery interrogatories); U.S. v. Leyden, 842 F.2d 1026, 1029 (8th Cir. 1988), citing Peters as illustrative of the applicability of "mail fraud" to "legal proceedings"; U.S. v. Vaughan, 797 F.2d 1485, 1492-1493 (9th Cir. 1986) (affirming attorney's mail fraud conviction for petition and follow-up letters he knew to be false in administrative proceeding).

Courts of Appeal and but also because the conflict concerns important immunity, civil rights, and RICO issues.

The Third District's decision deprives Donner of any federal remedy for this extreme interference with her access to the courts to vindicate her state-law based claims for false arrest, false imprisonment and cruel and inhumane conditions of incarceration and her federally-based Sec. 1983 claims for First and Fourteenth Amendment civil rights violations. Justice delayed is justice denied. In this case, justice has been delayed over sixteen years. Neither a municipal defendant nor its attorney nor its insurer nor any other person in conspiracy with them ought be privileged (via fraudulent pretrial discovery and public records misconduct) to delay a plaintiff's

access to the courts for so many years.

CONCLUSION

For all of the foregoing reasons, the jurisdiction of this Court should be invoked to review the decision below.

Respectfully submitted,

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MIRIAM DONNER

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MIRIAM DONNER,

Petitioner,

vs.

APPALACHIAN INSURANCE COMPANY, a Rhode Island corporation, CITY OF MIAMI, VERNON HETHERINGTON, FOWLER, WHITE, BURNETT, HURLEY, BANICK & KNIGHT, P.A. a/k/a FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P. A., a Florida professional association, PHILLIP W. KNIGHT, and MICHAEL J. MURPHY,

Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

MIRIAM DONNER, Appellant,
v.
APPALACHIAN INSURANCE COMPANY, A Rhode Island corporation; City of Miami; Vernon Hetherington; Fowler, White, Burnett, Hurley, Banick & Knight, P.A. a/k/a Fowler, White, Hurley, Banick & Strickroot, P.A., a Florida professional association; Phillip W. Knight, and Michael J. Murphy, Appellees.

No. 90-1222
District Court of Appeal of Florida,
Third District.

May 7, 1991.
Rehearing Denied July 3, 1991.

Before SCHWARTZ, C.J., and JORGENSON and GODERICH, JJ.

JORGENSON, Judge.

Miriam Donner appeals from an order dismissing her complaint with prejudice. We affirm.

This appeal is the latest in a fifteen-year-old litigation morass. Ms. Donner's original action was filed in 1976 and sought damages for injuries arising from her arrest and the circumstances of her incarceration. Following a series of

false starts, frustrated discovery forays, and appeals,[1] the 1976 action languishes below awaiting retrial. In 1981, Ms. Donner sued the City of Miami and various attorneys, seeking access to the litigation files from the suit filed in 1976. Eventually, the court ordered those files produced.[2] In 1989, Ms. Donner sued the parties and attorneys involved in the previous lawsuits for multiple causes of action arising from alleged fraudulent misrepresentations made during the discovery in the 1976 action, which only came to

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[1] *See Donner v. Hetherington*, 399 So.2d 1011 (Fla. 3d DCA 1981); *Donner v. Hetherington*, 376 So.2d 404 (Fla. 3d DCA 1979); *Donner v. Hetherington*, 370 So.2d 1225 (Fla. 3d DCA 1979).

[2] *See Edelstein v. Donner*, 450 So.2d 562 (Fla. 3d DCA 1984), *approved*, 471 So.2d 26 (Fla.1985); *Donner v. Edelstein*, 425 So.2d 1220 (Fla. 3d DCA 1983); *Donner v. Edelstein*, 423 So.2d 367 (Fla. 3d DCA 1982); *Donner v. Edelstein*, 415 So.2d 830 (Fla. 3d DCA 1982).

light following production of the litigation files. The trial court dismissed that complaint with prejudice for failure to state a claim; Ms. Donner appeals.

We agree with the trial court that the complaint Ms. Donner filed in this action failed to state a cognizable claim. *See Ponzoli & Wassenberg, P.A. v. Zuckerman*, 545 So.2d 309 (Fla. 3d DCA), (statements made in the course of judicial proceeding enjoy absolute privilege); rev. denied, 554 So.2d 1170 (Fla. 1989); *Wright v. Yurko*, 446 So.2d 1162 (Fla. 5th DCA 1984); *Perl v. Omni Int'l of Miami, Ltd.*, 439 So.2d 316 (Fla. 3d DCA 1983) (same). We therefore affirm the dismissal.[3]

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[3] Our affirmance should not be read to bar Ms. Donner from seeking to amend her complaint pending in the circuit court or from asking the trial court to impose sanctions against the defendants for their alleged misconduct in the discovery proceedings.

We assign no fault to either party for the length of this litigation. However, "[i]t has been well said that there must be some point in every court proceeding when the cause is finally disposed of, its thread cut, and parties out of court .... The public welfare demands that there shall be some definite end to litigation--a point sometime, somewhere, when every case is terminated. We cannot afford to return to the interminable and outrageous practice similar to that depicted in Dickens' case of *Jarndyce v. Jarndyce*." *Mabson v. Christ*, 96 Fla. 756, 759, 119 So. 131, 132 (1928). We trust that trial of this cause will occur before the litigation assumes such Dickensian proportions.

Affirmed.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA, GENERAL JURISDICTION DIVISION
CASE NO: 89-37625 CA17

MIRIAM DONNER,

Plaintiff,

vs.

APPALACHIAN INSURANCE COMPANY, a Rhode Island corporation, et al.,

Defendants.

FINAL ORDER OF DISMISSAL AND ORDER DENYING PLAINTIFF'S MOTION TO STAY

THIS CAUSE came to be heard on Tuesday, March 20, 1990, upon the Defendants, APPALACHIAN INSURANCE COMPANY; FOWLER, WHITE, BURNETT, HURLEY, BANICK & KNIGHT, P.A., a/k/a FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A., PHILLIP W. KNIGHT, MICHAEL J. MURPHY, VERNON HETHERINGTON, and the CITY OF MIAMI, Motion To Dismiss

Complaint, and Plaintiff's Motion To Stay Proceedings, and the Court having heard argument of Plaintiff and counsel, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED:

1. Plaintiff's Motion to Stay is denied;

2. Defendants' Motion To Dismiss Complaint is granted, with prejudice.

3. Plaintiff shall go hence without day and recover nothing from the Defendants, APPALACHIAN INSURANCE COMPANY; FOWLER, WHITE, BURNETT, HURLEY, BANICK & KNIGHT, P.A., a/k/a FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A., PHILLIP W. KNIGHT, MICHAEL J. MURPHY, VERNON HETHERINGTON, and the CITY OF MIAMI.

DONE AND ORDERED in Chambers at

Miami, Dade County, Florida, this 22 day of March, 1990.

GEORGE ORR
CIRCUIT COURT JUDGE

Entered March 27, 1990

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY

GENERAL JURISDICTION DIVISION

CASE NO: 89-37625 CA 17

MIRIAM DONNER, :

Plaintiff, :

vs. :

APPALACHIAN INSURANCE COMPANY, a Rhode Island Corporation, et al., :

Defendant(s):

ORDER ON PLAINTIFF'S MOTION FOR REHEARING AND ADDENDUM TO MOTION FOR REHEARING

There having been served and filed by Plaintiff a Motion for Rehearing and Addendum to Motion for Rehearing and the same having come on for hearing before the Court on April 26, 1990 and the Court having heard argument of Plaintiff and De-

fense counsel, it is hereby ORDERED and ADJUDGED that the said motion is denied.

DONE and ORDERED in Chambers at Miami, in Dade County, Florida this 26th day of April, 1990.

GEORGE ORR
CIRCUIT JUDGE

SUPREME COURT OF FLORIDA
TUESDAY, OCTOBER 29, 1991

MIRIAM DONNER, Petitioner,	*	
v.	*	CASE NO. 78,309
	*	DISTRICT COURT OF APPEAL, 3RD DISTRICT
APPALACHIAN INSURANCE COMPANY, ETC., ET AL., Respondents.	*	NO. 90-1222

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330 (d).

OVERTON, Acting C.J., MCDONALD, GRIMES, KOGAN and HARDING, JJ., concur

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D.1991
JULY 3, 1991

MIRIAM DONNER,	**	CASE NO. 90-01222
Appellant(s),	**	
vs.	**	
APPALACHIAN INSURANCE COMPANY, et al.,	**	LOWER TRIBUNAL NO. 89-37625
Appellee(s).	**	

Upon consideration, appellant's motions for rehearing, certification or clarification and rehearing en banc is hereby denied. Appellees' motion for clarification of decision is denied.

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const., amend. I reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., amend XIV, sec. 1 reads in pertinent part:

> ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; ...

42 U.S.C. section 1983 reads in pertinent

part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

18 U.S.C. section 1961 (1970) (amended 1984, 1986, 1988, and 1989) reads in pertinent part:

> As used in this chapter--
>
> (1) "racketeering activity"

means ... (B) any act which is indictable under ... section 1341 (relating to mail fraud) ...

* * *

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

18 U.S.C. section 1962 (1970) (amended

1988) reads in pertinent part:

> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. section 1964(c) reads in pertinent part:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including 'a reasonable attorney's fee.

18 U.S.C. section 1341 (1970) (amended 1988) reads in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud ... for the purpose of exe-

cuting such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service ... or knowingly causes to be delivered by mail according to the directions thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.